

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV-05-0990 WJ/LCS
CR-04-1033 WJ

ORLANDO ZAMARRON-PEREZ,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court for preliminary consideration of Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 23) filed September 14, 2005. *See* 28 U.S.C. § 2255 R. 4(b). In the motion Defendant contends that the Court "committed error by applying the guidelines [sic] as mandatory in sentencing. . . ." Although the Court of Appeals for the Tenth Circuit agreed with this proposition in Defendant's appeal, *see United States v. Zamarron-Perez*, 128 F. App'x 81, 83 (10th Cir. 2005), the court dismissed his appeal. As the court stated, " 'we cannot conclude that [Mr. Zamarron-Perez's] sentence is particularly egregious or a miscarriage of justice.' " *id.* (brackets in original) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 730 (10th Cir. 2005) (en banc)). The Tenth Circuit's adjudication of this issue on appeal precludes Defendant from raising it again here in a § 2255 motion. *See United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). The Court will dismiss the motion.

IT IS THEREFORE ORDERED that Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 23) filed September 14, 2005, is

DISMISSED with prejudice; and, pursuant to Fed. R. Civ. P. 58(a)(2)(A)(iii), *United States v. Sam*, No. 02-2307, 2003 WL 21702490, at *1 (10th Cir. July 23, 2003), judgment will be entered.



UNITED STATES DISTRICT JUDGE